

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

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: UNITED STATES OF AMERICA, :
: v. : CRIMINAL NO. 2:08-00286
: ARACOMA COAL COMPANY, INC., : APRIL 15, 2009
: Defendant. :
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TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JOHN T. COPENHAVER, JR.
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE UNITED STATES: USA CHARLES T. MILLER
AUSA HUNTER P. SMITH, JR.
U.S. Attorney's Office
P.O. Box 1713
Charleston, WV 25336

FOR THE DEFENDANT: ROBERT D. LUSKIN
Patton Boggs, LLP
2550 M Street, NW
Washington, D.C. 20037

MARK E. HEATH
Spilman, Thomas & Battle
P.O. Box 273
Charleston, WV 25321

PROBATION OFFICER: LEE CUEVA
U.S. Probation Office
300 Virginia Street East
Charleston, WV 25301

COURT REPORTER: BARBARA STEINKE, RMR
Post Office Box 75025
Charleston, WV 25375
(304) 347-3151

P R O C E E D I N G S

1:39 p.m.

THE CLERK: The case before the court is the *United States of America versus Aracoma Coal Company*, Criminal No. 2:08-00286. Would counsel note their appearance for the record, please.

MR. SMITH: For the government, Your Honor, United States Attorney Charles T. Miller and Assistant United States Attorney Hunter Smith.

MR. LUSKIN: Good afternoon, Your Honor. Robert Luskin for the defendant Aracoma Coal Company. With me is my colleague, Mark Heath; and also present, Your Honor, is Johnny Jones, the president of Aracoma Coal Company. As I mentioned when we were here in January, he joined Aracoma about eight months after the accident, but is familiar with the matters.

THE COURT: Very good. It may be that Mr. Jones should be sworn.

THE CLERK: Please stand and raise your right hand.

(Johnny Jones was sworn.)

THE COURT: Mr. Luskin, have you, together with Mr. Jones, been over the probation department's presentence report in this case?

MR. LUSKIN: Yes, Your Honor, we have.

THE COURT: And I take it it's fair to say you've been over it thoroughly --

MR. LUSKIN: Quite thoroughly, sir.

1 THE COURT: -- as one can tell from the sentencing
2 memoranda. And I would ask whether or not the defendant has any
3 objections to the report.

4 MR. LUSKIN: None, Your Honor. I'm sorry to say, I've
5 become acquainted with Ms. Cueva's work, and it's its usual high
6 standard. She does note in the revised presentence report that
7 there was an objection concerning restitution. In fact, it
8 certainly was not an objection to any of the representations in
9 the presentence report, but simply our effort to raise issues
10 which are for the court's consideration about whether or not
11 certain of the individuals may be victims. But with respect to
12 the report itself, we have no objections, sir.

13 THE COURT: Very good.

14 And Mr. Jones, that is your understanding as well, is it?

15 MR. JONES: Yes, sir.

16 THE COURT: Thank you.

17 Does the government have any objections?

18 MR. SMITH: No, Your Honor.

19 THE COURT: Thank you.

20 Let me ask -- first of all, I take it the parties are in
21 agreement that the sentencing guidelines do not apply to the
22 calculation of a fine in this case; is that correct?

23 MR. SMITH: Yes, Your Honor.

24 MR. LUSKIN: Yes, sir, that is correct.

25 THE COURT: Thank you.

1 The court is interested, Mr. Smith, in ascertaining what
2 steps have been taken by the United States Attorney to notify
3 any possible victims in this matter.

4 MR. SMITH: Your Honor, our office has provided notice
5 of status as a potential victim to really three groups of
6 miners: The miners who were on the 2 section which was the
7 section where Mr. Bragg and Mr. Hatfield were; miners --

8 THE COURT: And that would be twelve in number?

9 MR. SMITH: Yes, Your Honor, I believe that's correct.
10 That's the number of men on the crew originally, yes.

11 THE COURT: At the No. 2 section.

12 MR. SMITH: Yes, on that shift.

13 We also notified all the miners who were on the longwall
14 shift at that time who we believe we have correctly and
15 completely identified.

16 We also notified a third group, three individuals, who were
17 involved in discovery and fighting the fire within the first few
18 minutes. That would be Bryan Cabell, Patrick Callaway, and
19 Jonah Rose. All of those individuals, Your Honor, have received
20 notice from the United States that they might be -- they might
21 have rights as victims in this prosecution.

22 THE COURT: Those three individuals, were they in
23 addition to what I understand to be the nine who were on the
24 longwall section?

25 MR. SMITH: Yes, Your Honor. I believe none of those

1 three were on the longwall shift at that time.

2 THE COURT: And so, that accounts for I think probably
3 twenty-six. I understand there were a total of twenty-nine
4 miners who entered the mine on that shift. Where would the
5 other three have been?

6 MR. SMITH: They were not -- they were not inside the
7 mine. They were not -- if I may use the jargon word, they were
8 not in by the fire. They were between the fire and the entrance
9 to the mine, the surface entrance to the mine.

10 THE COURT: Do I understand you to say then that the
11 government has notified everyone whom it believes could possibly
12 have a claim as a victim in this matter?

13 MR. SMITH: Yes, Your Honor.

14 THE COURT: And secondly, what victim impact statements
15 have you received in the matter, if any?

16 MR. SMITH: Your Honor, in addition to the ones
17 received by -- that have been provided to Ms. Cueva, we
18 received --

19 THE COURT: And those being?

20 MR. SMITH: If I may --

21 THE COURT: Is that on behalf of Mr. Bragg and
22 Mr. Hatfield --

23 MR. SMITH: Well --

24 THE COURT: -- their respective estates?

25 MR. SMITH: No, that's not what I meant, Your Honor.

1 THE COURT: All right.

2 MR. SMITH: If I may then. Of course, the
3 representatives of Mr. Bragg and Mr. Hatfield were -- were
4 notified. They did not file any victim witness statement. And
5 Mr. Stanley and Ms. Hatfield are here today, and will address
6 the court at some point, I believe, regarding that -- those
7 matters.

8 With respect to the 2 section miners, most of them are
9 represented by --

10 THE COURT: By that, you mean the No. 2 section miners.

11 MR. SMITH: Yes, Your Honor. Most of those are
12 represented by a couple of lawyers, Sam Hrko and Tim Bailey.
13 Those are Gary Baisden, Randy or Randall Crouse, Steve Hensley,
14 Joseph Hunt, Patrick Kinser, Harold Shull, Thomas Vanover.
15 Those were the 2 section miners notified.

16 THE COURT: Okay. Those are the No. 2 section miners
17 that were notified.

18 MR. SMITH: Yes.

19 THE COURT: And there are seven in number who are
20 represented, did I understand you to say --

21 MR. SMITH: Yes, Your Honor.

22 THE COURT: -- by Mr. Hrko and perhaps Mr. Bailey?

23 MR. SMITH: Yes, Your Honor.

24 THE COURT: Very good. And as I understand it, I think
25 all seven of those individuals have filed a notice of their

1 claim with Ms. Cueva; is that correct? Is that how you received
2 those? Did they come directly to you, Ms. Cueva?

3 THE PROBATION OFFICER: Your Honor, some of them came
4 directly to me from the potential victims and some came from the
5 United States Attorney's Office through their victim witness
6 coordinator.

7 THE COURT: But those seven include all of them.

8 THE PROBATION OFFICER: Correct.

9 THE COURT: Thank you.

10 MR. SMITH: Those same two lawyers represent one other
11 individual, Your Honor. I believe he has provided material
12 either directly or indirectly to probation. His name is Jonah
13 Rose. He was not a 2 section miner.

14 THE COURT: Did you say Rose?

15 MR. SMITH: Rose, R-o-s-e, Your Honor.

16 THE COURT: Is that the same as the individual who was
17 attendant at the time efforts were being made to put out the
18 fire?

19 MR. SMITH: Yes.

20 THE COURT: Thank you.

21 MR. SMITH: Yes.

22 THE COURT: And the notice that was given by the United
23 States Attorney to all of these individuals, in what form did it
24 go and of what were they notified?

25 MR. SMITH: Your Honor, the victim witness coordinator

1 in our office notified in writing those individuals, I believe
2 most of them, both through their attorney and individually.
3 Most of those individuals asked both that their attorney be
4 notified and that the individual himself get notice. The form
5 of the notice itself --

6 THE COURT: You are telling me about most of them. I
7 want to know about all of them. And so, I want you to be
8 comprehensive; or if you cannot tell the court that that which
9 you are stating applies to each and every one of them, you need
10 to tell me to whom it did apply and to whom it didn't.

11 MR. SMITH: With respect to the No. 2 section miners,
12 those seven miners that I named, Mr. Baisden himself and his
13 attorney was notified, Mr. Crouse and his attorney were
14 notified, Mr. Hensley and his attorney were notified, Mr. Hunt
15 and his attorney were notified, Mr. Kinser and his attorney were
16 notified, Mr. Shull and his attorney were notified, Mr. Vanover
17 and his attorney were notified. All seven of those were
18 individually notified, as well as notice going to their
19 attorney.

20 THE COURT: And we understand that they were notified
21 because they have filed their losses with the court. What about
22 the others who have not filed an impact statement or have not
23 otherwise been heard?

24 MR. SMITH: Well, Your Honor, if I may complete the
25 list of people who have made some response first, I mentioned

1 that Mr. Rose has, and notice was sent to Mr. Rose and to his
2 attorney. One additional miner on the longwall is named Johnny
3 Brown. Mr. Brown is represented by Mrs. Tonya Hatfield, and
4 notice was given to him both personally and through his
5 attorney. With respect to Mr. Brown, Ms. Hatfield filed with me
6 last week at the guilty plea hearing of David Runyon some
7 medical records to serve as notice of his potential status as a
8 person entitled to restitution. That was done a little bit late
9 in the process and hasn't been provided to probation yet and
10 hasn't been provided to defense counsel in any way and is not
11 referenced in the presentence report, and I can address that
12 further at an appropriate time.

13 Also, a longwall miner --

14 THE COURT: What was the name again?

15 MR. SMITH: Johnny Brown. He and his counsel are
16 present here today.

17 THE COURT: Very good. Then they can answer us in a
18 moment as to whether or not they are presenting a claim.

19 MR. SMITH: And, finally, Your Honor, we received a
20 response from a longwall miner named -- I think it's Jammie,
21 J-a-m-m-i-e, Adkins. He is not represented by an attorney. I
22 believe that a copy of that was provided to Ms. Cueva by our
23 victim witness coordinator. Those are the only individuals in
24 that group who have responded to the notices we sent.

25 THE COURT: My question of you was, what notice went

1 and to whom. And if you can tell me comprehensively, I'll be
2 pleased to accept it. Has the United States Attorney seen that
3 notice went to the 26 individuals that you have referred to out
4 of the 29 that were underground that day, three of whom may not
5 have been underground at all? That's really my question of you.

6 MR. SMITH: The seven miners on the No. 2 section who
7 I've listed got notice personally and through their counsel.
8 Three other miners on that section, Mr. Plumley, who was the
9 foreman, got notice both directly to himself and to his
10 attorney, Mike Fisher. Two other miners on that section got
11 individual notice, Elmer Mayhorn and Billy Mayhorn; and Billy
12 Mayhorn, his attorney, Dwane Tinsley, also got notice of Billy
13 Mayhorn's potential status as a victim.

14 THE COURT: When you say they got notice, is it they
15 had notice to file a victim impact statement or a declaration if
16 they wished to do so?

17 MR. SMITH: Yes, Your Honor.

18 THE COURT: Any other notified of this sentencing
19 hearing today?

20 MR. SMITH: These were all notified of the sentencing
21 hearing today, as I've indicated, either individually or
22 individually and with a lawyer.

23 THE COURT: You seem now to have covered everyone on
24 Section 2, there being twelve. What about everyone else? They
25 also received this same notice?

1 MR. SMITH: Yes. On the group of three, Your Honor,
2 Jonah Rose, through his attorney and individually, got notice;
3 Mr. Bryan Cabell got notice simply to his attorney, Thomas
4 Scarr; and Mr. Calloway, I believe, got only individual notice,
5 and to our knowledge, he has no attorney.

6 THE COURT: And so, you have no word of any other
7 claims, if I understand it, besides those that have been filed,
8 save for Mr. Adkins and Mr. Brown.

9 MR. SMITH: Yes, Your Honor.

10 THE COURT: And I understand Mr. Brown is present and
11 perhaps his attorney is with him; and if that's the case, I
12 would ask whether or not there is a claim on his behalf to be
13 filed seeking restitution in this matter.

14 MR. SMITH: Your Honor, his attorney is Tonya Hatfield.
15 May she come forward --

16 THE COURT: Certainly.

17 MR. SMITH: -- to address the court?

18 MS. HATFIELD: Thank you, Your Honor. May it please
19 the court.

20 THE COURT: Yes, ma'am.

21 MS. HATFIELD: I'm Tonya Hatfield representing Johnny
22 and Kimberly Brown in a Logan County Circuit Court action now
23 pending, and that trial is set for October 26th of this year.
24 There is actually mediation that is already scheduled for July
25 16 of this year. We anticipate we may resolve the issues at

1 that time.

2 I noticed in the defendant's presentence memorandum, that
3 there was reference to seven of the miners being survivors and
4 some allegations made with regard to restitution. I would
5 submit on behalf of Johnny Brown, that he has suffered physical
6 manifestations of psychological injury. He has also suffered
7 physical injuries as a result of this.

8 And so, I've spoken with Mr. Hunter Smith of the U.S.
9 Attorney's Office, and one of the things that we discussed was
10 the possibility of deferring on whether or not Johnny Brown
11 would want to claim restitution at a later time. I'm not sure
12 if the court would be able to entertain that. Certainly
13 Mr. Brown does not want to hold up these proceedings or cause
14 any undue burden to the court in the context of this criminal
15 matter.

16 So we would look to the court for guidance at this point in
17 time, Your Honor.

18 THE COURT: Well, the court expected that you would
19 have filed notice of any claim that you have by this time. The
20 plea was taken in this case three months ago; and I gather from
21 what Mr. Smith has stated, that there has been adequate notice
22 that has gone to each of the individuals who may have a claim.

23 And so, the court is interested, if you have a claim, in
24 stating it and filing it in writing, of course. I am not
25 inclined to continue these proceedings unless there is some

1 compelling reason to do so. And if there is, the court will do
2 just that. But I haven't heard any reason why it should not
3 already have been filed.

4 MS. HATFIELD: There is none, Your Honor. I've
5 consulted with Mr. Brown and his wife, and at this time they are
6 not making a claim for restitution. So, if asked to give a
7 definitive answer, there is no claim for restitution.

8 THE COURT: Thank you.

9 Let me ask if you have anything further.

10 MS. HATFIELD: No.

11 THE COURT: Thank you, Ms. Hatfield.

12 Reference was made in Mr. Smith's remarks to something that
13 may have been filed with the probation officer by Mr. Adkins.
14 Did I understand that correctly?

15 MR. SMITH: Yes, Your Honor. I'm sorry, does Ms. Cueva
16 have that?

17 THE PROBATION OFFICER: I don't believe the probation
18 has that -- office has that. Everything the probation has has
19 been filed with the court.

20 THE COURT: All right. Thank you.

21 MR. SMITH: Your Honor, if I might have just a moment.

22 THE COURT: Go ahead.

23 MR. SMITH: May I consult with Ms. Cueva for just a
24 moment?

25 THE COURT: You may.

1 (Pause.)

2 MR. SMITH: Your Honor, that may have been my mistake.
3 There was -- there was a claim received in writing in the form
4 prescribed by our office, and I apparently failed to get it to
5 Ms. Cueva in a timely fashion, but Mr. Adkins did file the
6 claim. I'm not sure defense counsel has seen it since it didn't
7 get to Ms. Cueva. It does seem not to allege, even in
8 conclusory terms, any bodily injury, but he did file in writing
9 a victim impact statement and I would be happy to provide copies
10 to the parties or the court at this time or an appropriate time.

11 THE COURT: Well, it looks to me as though you are
12 handling a two-page document; and if that is the case, I'm going
13 to ask you to turn it over to Mr. Luskin and he can look at it
14 quickly now and I can look at it as well, and the parties then
15 can tell me what position to take with respect to it.

16 MR. SMITH: Thank you, Your Honor.

17 Your Honor, might I approach --

18 THE COURT: Please.

19 MR. SMITH: -- with Mr. Adkins' victim impact
20 statement?

21 THE COURT: May I review that a moment.

22 I wanted to inquire as well whether or not Mr. Adkins would
23 have been one of the surviving ten out of the Section 2 group.

24 MR. SMITH: No, Your Honor. He was on the longwall.

25 THE COURT: All right. Thank you. And I take it

1 there's no objection to filing this victim impact statement on
2 behalf of Jammie Edward Adkins.

3 MR. SMITH: No objection, Your Honor. I might ask it
4 be filed under seal to protect Mr. Adkins' privacy.

5 MR. LUSKIN: Your Honor, no objections, and we would
6 concur in the recommendation, consistent with the statute, that
7 it be filed under seal.

8 THE COURT: The court will file it under seal until the
9 further order of the court.

10 Let me ask about the seven that have already been filed.
11 Have they been filed at all with the court? And, more
12 particularly, I don't recall those being filed under seal.

13 MR. SMITH: They have not been filed with the court.
14 They have been provided to the probation department. I believe
15 counsel has them, but they have not been filed with the court.
16 We will do that at the court's direction if it wishes.

17 THE COURT: Well, we may handle that in keeping with
18 some further colloquy with counsel for those individuals at this
19 hearing --

20 MR. SMITH: Thank you, Your Honor.

21 THE COURT: -- and we'll decide that at a later time.
22 Anything further on the Adkins' matter at this time?

23 MR. SMITH: No, Your Honor.

24 MR. LUSKIN: No, Your Honor.

25 THE COURT: Thank you.

1 In addition to those filings, the court has heard earlier on
2 behalf of Ms. Bragg and Ms. Hatfield, and can the government
3 tell me what position of each Ms. Bragg and Ms. Hatfield and the
4 estates of each of their deceased husbands is now with respect
5 to restitution.

6 MR. SMITH: Yes, Your Honor.

7 Mr. Stanley and Ms. Hatfield are here who represent these
8 estates, these individuals, and can address the court. The
9 position they take and the one that the United States supports
10 is, first, that they do not seek restitution in this criminal
11 case. They are willing to waive any right they have to
12 restitution in this criminal case.

13 And second, they do not wish to advise the court of the
14 terms of the settlement agreement. They desire that it remain a
15 private, nondisclosed matter. And the United States submits
16 that given that they are not seeking restitution and are willing
17 to make representations to the court specifically to that end,
18 that there really is little need to get that figure. The United
19 States does not know that figure, Your Honor.

20 THE COURT: The United States what, sir?

21 MR. SMITH: Does not know the civil settlement figure.

22 THE COURT: Thank you.

23 And if there's nothing further from the government on that
24 matter, I want to call on Mr. Stanley in just a moment, but,
25 Mr. Luskin, have you anything further on that?

1 MR. LUSKIN: No, Your Honor. As Your Honor recalls, in
2 the plea agreement itself, we agreed with the government that
3 Mrs. Bragg and Mrs. Hatfield were entitled to restitution, and
4 also agreed with the government that the appropriate measure for
5 that restitution would be the settlement in the civil case. So,
6 if they choose in this proceeding not to file any statements, we
7 obviously don't have any objections, but do believe that the
8 resolution of that case, obviously to which they agreed and
9 which was approved by the court, should give this court
10 confidence that our responsibilities to them were appropriately
11 discharged through that civil settlement.

12 THE COURT: Thank you.

13 Mr. Stanley, do I understand correctly that you are here
14 today --

15 MR. STANLEY: Yes, Your Honor.

16 THE COURT: -- for Ms. Hatfield?

17 MS. HATFIELD: Yes.

18 THE COURT: And I would ask you whether you have any
19 statement that you wish to make, or whether Mrs. Hatfield does,
20 both of you, for that matter; and if you do have a statement to
21 make, you are welcome to come forward.

22 MR. STANLEY: Your Honor, I do have a statement to make
23 on behalf of the widows if I may approach.

24 THE COURT: If you would, please.

25 MS. HATFIELD: Your Honor, I won't be making a

1 statement; Mr. Stanley will.

2 THE COURT: Thank you, ma'am.

3 MS. HATFIELD: Thank you.

4 MR. STANLEY: Your Honor --

5 THE COURT: Can I ask you a question first.

6 MR. STANLEY: Yes, sir.

7 THE COURT: Has Mr. Smith stated it correctly that
8 Ms. Hatfield on behalf of herself and estate does not have a
9 claim for restitution in this case?

10 MR. STANLEY: He has, Your Honor.

11 THE COURT: Thank you.

12 Do you represent the Bragg estate as well?

13 MR. STANLEY: Yes, Your Honor.

14 THE COURT: Is the same thing true with respect to the
15 Bragg estate?

16 MR. STANLEY: Yes, it is, Your Honor, and I have a
17 short statement I would like to read into the record that
18 addresses the issue.

19 THE COURT: So that would be true on behalf of both
20 Ms. Bragg and the estate of Mr. Bragg.

21 MR. STANLEY: That is correct, Your Honor.

22 THE COURT: Thank you. And pardon me for interrupting
23 you.

24 MR. STANLEY: That's quite all right, Your Honor.

25 Your Honor, the widow of Don Bragg, Ms. Delores Bragg, and

1 the widow of Elvis Hatfield, Ms. Freda Hatfield, have asked me
2 to offer a short statement on their behalf. As I said, I am
3 Bruce Stanley, their attorney. Ms. Bragg is here today.
4 Ms. Hatfield was unable to attend.

5 We have seen the presentencing memorandum submitted by
6 Aracoma's lawyers. First, let me make clear that the widows,
7 both personally and in their capacity as administratrixes of
8 their dead husbands' estates, desire to maintain the confidence
9 of the terms of the settlement they reached following nearly
10 three years of litigation and a week of trial before a Logan
11 County jury. They are not seeking restitution through these
12 proceedings. But they certainly hope to dispel any notion that
13 such civil settlement came as a result of any remorse on the
14 part of Aracoma, Massey Energy, or Don Blankenship.

15 Indeed, two days after a settlement was achieved, the
16 following quotes were attributed to Massey's CEO, Don
17 Blankenship: That Masseys lawyers had to, quote, measure the
18 potential outcomes and make a settlement based on business
19 rather than fairness. That because of West Virginia's, quote,
20 very liberal system, quote, you have to take that into account
21 when you are in those situations. That, quote, it's just a
22 mistake and people make mistakes. Unfortunately, sometimes it's
23 bad. That described Mr. Bragg and Mr. Hatfield as, quote, the
24 two that didn't, for whatever reason, get their mask on or panic
25 or whatever happened. That the inspectors were just as

1 responsible as anyone at Massey. Quote, we're the first line
2 responsibility there, but so, too, are state inspectors and
3 federal inspectors and so forth.

4 Indeed, the widows respectfully suggest that this honorable
5 court should review the findings of the Mine Safety and Health
6 Administration's internal investigation into this patently
7 avoidable crime before allowing a plea that lets Massey Energy
8 go scot-free. The widows find it both frustrating and
9 fascinating that Aracoma, after three years of tenacious
10 engagement contesting civil liability, is now prepared to
11 readily admit criminally that which it so vehemently denied
12 civilly. Apparently, the difference can be expressed as the
13 portion of insurance coverage availability. Aracoma and Massey
14 apparently concluded that the running coverage dispute with
15 their carrier justified confrontation with the widows in open
16 court; these same widows that they now admit in writing are the
17 victims of their crimes.

18 Make no mistake, the decision by these women to not seek
19 restitution has nothing to do with any remorse on the part of
20 Aracoma or its human managers, most of whom were employed there
21 on the occasion of no less than three -- yes, three --
22 underground mine fires, only the last of which, the killer one,
23 was reported to authorities. These same Aracoma managers are
24 presumably still under investigation by these same prosecutors.

25 These women are tired widows, and Aracoma made them that

1 way. They simply request that this honorable court remember as
2 much when it makes its rulings.

3 And I can provide a copy of that to the court if you would
4 like, Your Honor.

5 THE COURT: I would appreciate your doing so.

6 MR. STANLEY: If I may approach.

7 Your Honor, I don't know if this is the appropriate time,
8 but I was given a card and note that was prepared by Mr. Bragg's
9 younger brother. If the court would want me to go ahead and
10 make that statement on the record now, I can do so.

11 THE COURT: Please do.

12 MR. STANLEY: Your Honor, it's a card that is titled,
13 "To my brother, my friend," and it reads: "We fussed and we
14 teased, we had fights and we had fun, and always in my heart I
15 knew that I would do anything for you. We forged a bond that
16 time cannot erase, and we share a secret smile that the world
17 will never understand. We grew up, but we never grew apart. I
18 know how hard you worked and I see all the things you do for the
19 people you love. What a wonderful person you have become. You
20 can never know how proud I am to tell the world that's my
21 brother, but I am even prouder to say that's my friend."

22 And it carries a handwritten note that says, "Riz, I'm sorry
23 that I wasn't there when you needed me. Now it feels like I'm
24 being punished every day. It hurts that bad. I stay mad at the
25 world now because I'll never see you again. It's not fair, it's

1 not right, and I hate myself because I can't change that. I
2 miss you. I love you. Your little brother, JJ."

3 Thank you, Your Honor.

4 THE COURT: Thank you.

5 We'll be in recess for about five minutes.

6 (At 2:12 p.m. there was a recess until 2:21 p.m.)

7 THE COURT: Please be seated.

8 With respect to the remaining claims that have been filed by
9 seven individuals, I understand counsel are present in the
10 person of Mr. Hrko and Mr. Bailey, and I would ask whether or
11 not the parties are ready to be heard on those matters.

12 MR. SMITH: Your Honor, the United States is ready and
13 would like to make a short statement about those, if we may, to
14 begin.

15 THE COURT: Please do. Let me ask to have the
16 appearance of those who are appearing on behalf of those seven
17 individuals.

18 MR. HRKO: Sam Hrko, Your Honor.

19 THE COURT: Thank you.

20 MR. HRKO: Mr. Bailey is not here.

21 THE COURT: Thank you.

22 MR. SMITH: There may actually be eight as well, if we
23 count Jonah Rose.

24 MR. HRKO: Correct, Your Honor.

25 THE COURT: And, Mr. Hrko, you represent him as well?

1 MR. HRKO: Correct.

2 THE COURT: And what did we finally decide on Johnny
3 Brown?

4 MR. SMITH: Mr. Brown told the court that he, through
5 his counsel, Tonya Hatfield, that he did not seek restitution in
6 this matter.

7 THE COURT: Very good.

8 And so, if we might hear about the remaining eight.

9 MR. SMITH: Your Honor, Mr. Hrko has provided
10 substantial materials, including the reports of examinations by
11 medical professionals regarding these eight individuals, and
12 nothing that we say here today, Your Honor, would deny that
13 these men have been profoundly affected by the fire.

14 We believe, having reviewed the material very carefully,
15 that they are not eligible for restitution under the statute
16 because of the failure to show a bodily injury as required by
17 the statute. We certainly don't dispute the fact that these men
18 have suffered and are suffering, but we don't believe they fall
19 within the reach of the statute that requires as a threshold
20 bodily injury.

21 We can discuss more details about that, but that is, in
22 short, the position of the United States, Your Honor.

23 THE COURT: Have you had occasion to have any
24 conversation with counsel for those eight individuals as to the
25 applicable law?

1 MR. SMITH: Yes, Your Honor, we have. The specific
2 narrow issue is whether there is bodily injury resulting from
3 some smoke inhalation, and the position of the United States,
4 again, we came to this kind of reluctantly, but the position is
5 the materials provided really don't show that there is
6 sufficient -- or that there is a qualifying bodily injury to
7 make them entitled to restitution. Mr. Hrko and I have
8 discussed on a number of occasions this issue, both factually
9 and legally, and I believe he is conversant in the issue. He
10 knows what the issue is there. And I have advised him that we
11 intended to make this position known to the court at this time.
12 Again, it's not denying the profound affect of this on these men
13 and many others, but it is an application of the statute that
14 Congress gave us to work with here.

15 THE COURT: Thank you.

16 With that introductory statement, I don't know whether to
17 turn next to Mr. Hrko or Mr. Luskin, but, Mr. Hrko, would you
18 like to be heard at this point?

19 MR. HRKO: I would like to be heard, judge, whenever
20 you want to hear me.

21 THE COURT: Please come on up.

22 MR. HRKO: Thank you, judge, for hearing me.

23 I was at the plea hearing, and the court inquired of the
24 United States Attorney's Office as to any other potential
25 victims. The court directed Mr. Smith to inquire as to other

1 victims. That next day, I think, I either called or sent
2 Mr. Smith a letter, and we've been in contact with each other
3 since.

4 My clients were given the opportunity to present victim
5 impact statements, and they chose to do so. What we decided to
6 do was to attach certain pieces of discovery that had been
7 produced in our civil action, which is currently pending in
8 Logan County, to the victim impact statements and rely upon
9 that. We attached two medical exams, one by an M.D., one by a
10 Ph.D., regarding psychological issues. We produced an economic
11 report and we produced a vocational report.

12 What we haven't produced is any medical evidence, any
13 medical records or any deposition testimony because, quite
14 frankly, we don't have any deposition testimony at this point,
15 regarding what impact this fire had upon my clients. As far as
16 the legal issue regarding how physical injury is defined in the
17 United States Code, I have had several conversations with
18 Mr. Smith. I have reviewed the sentencing memorandum, which
19 actually was not served on me, but I found, through independent
20 sources, I reviewed it briefly today before the hearing.

21 I guess the only thing left to say is with respect to
22 whether or not there was a physical injury, we feel it would be
23 better for a jury in Logan County to hear all the evidence, to
24 hear how the fire impacted these eight individuals, and let them
25 make that determination. And while I'm not standing here saying

1 we're withdrawing or we're pulling back, I guess my point is,
2 Your Honor, we submitted statements to you as evidence of the
3 impact. And, to tell you the truth, that was done before there
4 was a physical injury, any discussion on my part with the United
5 States Attorney regarding the physical injury issue.

6 While granted, the psychological issue is a huge part of our
7 civil action below, I don't think anyone can go through a fire
8 without having some physical injury. They breathe the contents
9 of the fire. They are -- we are in the process of scheduling
10 medical examinations in Pittsburgh by Aracoma's expert, Dr. Feno
11 (phonetic), to do what I suppose will be pulmonary function
12 tests.

13 And just to wrap up, judge, I think all those issues -- I
14 think Aracoma is correct. All those issues will involve a lot
15 of discovery, a lot of evidence, and that's -- that's what the
16 civil case is about. And if there's any other questions from
17 the court, I guess the only thing I would want to leave the
18 court with is based upon what we have provided Your Honor, our
19 claims may not rise to physical injury, but I don't want to
20 waive them, and ask the court to make no finding with respect to
21 that beyond what evidence has been presented.

22 THE COURT: The court's findings will necessarily be
23 based upon that which is before it, and I believe that you are
24 conceding that that which is before the court at this juncture
25 is limited to psychological impairment.

1 MR. HRKO: Correct.

2 THE COURT: And perhaps you are conceding as well that
3 if that's all there is, and it is much, I would readily
4 acknowledge, but if it is that rather than bodily injury or
5 associated with bodily injury, do I take it that you concede
6 that it's not compensable in this proceeding as distinguished
7 from the Logan County proceeding?

8 MR. HRKO: Correct. I guess we reserve the right to
9 present that evidence to the court, the Circuit Court of West
10 Virginia.

11 THE COURT: I see. I gather then that the claims at
12 this juncture in this court are limited to psychological injury
13 as distinguished from bodily injury.

14 MR. HRKO: Correct.

15 THE COURT: And if that were the case, it would be the
16 court's expectation that it would not be the subject of
17 restitution in this matter which I take it is what you
18 anticipate.

19 MR. HRKO: After having conversations with Mr. Smith,
20 you are correct, judge, I anticipated that -- that finding.

21 THE COURT: Very good. I thank you for the
22 presentation.

23 MR. HRKO: Thank you, judge.

24 THE COURT: And I gather that you are speaking on
25 behalf of all eight of those individuals that we've earlier

1 identified.

2 MR. HRKO: Correct. Would you like me to list those
3 eight for the record?

4 THE COURT: It might be a good idea.

5 MR. HRKO: Joseph Hunt, Steve Hensley, Harold Shull,
6 Patrick Kinser, Thomas Vanover, Gary Baisden, Randall Crouse,
7 and Jonah Rose.

8 THE COURT: Thank you. I think those names all comport
9 with the materials we already have, that is, including Mr. Rose,
10 and that being the case, the court so understands.

11 MR. HRKO: Thank you, judge.

12 THE COURT: Thank you very much.

13 MR. HRKO: Thank you.

14 THE COURT: Is there anyone else here on behalf of any
15 of those eight individuals?

16 I take it there is no one else.

17 And in light of that which has been stated, Mr. Luskin, have
18 you any comment?

19 MR. LUSKIN: Just two things to add, Your Honor.

20 First, I certainly agree with both Mr. Smith and Mr. Hrko,
21 that there is not evidence before the court of bodily injury;
22 and as the court is well aware, bodily injury is a statutory
23 requirement before restitution may be ordered.

24 I also agree with Mr. Hrko that to the extent that there may
25 in theory be any compensable injuries, as opposed to injury that

1 is subject to restitution as part of this sentencing, that it is
2 better subject to determination in the parallel civil proceeding
3 pending in Logan County.

4 I would add only that we also reviewed for the first time
5 this afternoon the statement filed by Jammie Adkins, who is not
6 represented by Mr. Hrko, but a review of his statement makes
7 clear that he claims to be suffering from anxiety and depression
8 arising from the events in January of 2006, and that his victim
9 impact statement also does not allege anything other than
10 psychological injuries. Therefore, not injuries subject to
11 restitution under the terms of the statute.

12 THE COURT: Thank you.

13 Mr. Smith.

14 MR. SMITH: Your Honor, again, acknowledging the very
15 real problems alleged by Mr. Adkins, we agree that his claim
16 does not include any allegation of bodily injury; and without
17 that, the statute doesn't allow the court to order restitution
18 for him in this proceeding, and we think the court should not do
19 that for that reason.

20 THE COURT: Thank you.

21 Just a moment.

22 Ms. Cueva, we want to be sure we're straightened out on
23 this. Do you have a victim impact statement on behalf of
24 Mr. Rose and which you may have, and do you have one on behalf
25 of Mr. Baisden which you may not have?

1 THE PROBATION OFFICER: May I check my records?

2 THE COURT: Thank you.

3 THE PROBATION OFFICER: I have a statement from
4 Mr. Rose. The other?

5 THE COURT: Mr. Baisden.

6 THE PROBATION OFFICER: I do not have a victim impact
7 statement from Mr. Baisden.

8 THE COURT: Thank you.

9 Mr. Hrko, we have seven that include Mr. Rose, but it
10 doesn't include Mr. Baisden, and I wonder whether it has in fact
11 been filed with anyone.

12 MR. SMITH: Your Honor, I have it, and, again, if
13 Ms. Cueva doesn't have it, then it's my failure and I apologize
14 for that. It is -- it was addressed by Mr. Hrko and I believe
15 accurately. I apologize, but I do have it. I have it in my
16 hands here.

17 THE COURT: All right. I'm going to call on Mr. Hrko,
18 though, at this juncture to ask him. These are lengthy
19 statements. The court has been through them. I have not seen
20 Mr. Baisden's statement. Would I be correct in understanding
21 that it's drawn in the same language with the same support as
22 the other seven were?

23 MR. HRKO: That would be accurate, Your Honor.

24 THE COURT: Purely psychological injury shown.

25 MR. HRKO: Correct.

1 THE COURT: Thank you.

2 MR. HRKO: And, Your Honor, can I just say one more
3 thing?

4 THE COURT: Go ahead.

5 MR. HRKO: This was brought up earlier. If any of
6 these statements are filed on behalf of the eight individuals, I
7 would ask that they be filed under seal.

8 THE COURT: The court may choose to leave them in the
9 hands of either the United States Attorney or the United States
10 Probation Officer, or both, without filing on the public record.
11 And at the moment I don't see any need for doing otherwise
12 because there seems to be no issue that needs to be resolved
13 regarding them. The matter has been conceded, as I understand
14 it, as a matter of law here at this hearing today. And if
15 that's a correct understanding, I believe we can leave them all
16 in that posture.

17 MR. SMITH: The United States would -- we think that's
18 the right thing to do, Your Honor.

19 THE COURT: All right.

20 MR. LUSKIN: Your Honor, we concur.

21 THE COURT: Mr. Hrko, do you agree?

22 MR. HRKO: I can agree to that, judge.

23 THE COURT: Very good. Then we'll leave it at that.
24 And because we're treating those in that fashion, we'll do the
25 same with Mr. Adkins, and I believe that covers the matter in

1 its entirety insofar as restitution is concerned. As I
2 understand it, based on the results of the hearing today, there
3 is no restitution to be ordered.

4 MR. SMITH: That's correct, Your Honor.

5 MR. LUSKIN: Yes, sir.

6 THE COURT: Thank you.

7 And, Mr. Hrko, you need not remain further. You and
8 Ms. Hatfield are both welcome to remain if you wish to do so,
9 but in view of these developments, I think that there will be no
10 further factor involved that will affect you.

11 As to Tonya Hatfield, it may be as to your client, if the
12 court were for any reason to determine that this matter should
13 be continued, I would give you that additional time in which to
14 file something if you wish to do it; and so, that's about the
15 only reason I can see that you may wish to remain, but you may
16 wish to do so for other reasons, you are welcome to stay.

17 MS. HATFIELD: Thank you, Your Honor.

18 THE COURT: Let me ask counsel about a matter that was
19 raised by Mr. Stanley in which he says that Ms. Bragg and
20 Ms. Hatfield suggest that the court should review the findings
21 of the Mine Safety and Health Administration's internal
22 investigation. What is the status of that matter? The court
23 believes that the administrative law judge made findings and
24 that perhaps the commission for the Mine Safety and Health
25 Administration has perhaps undertaken to review that matter.

1 What is the status?

2 MR. SMITH: Your Honor, I believe we're talking about
3 two separate things.

4 MR. HEATH: Yes.

5 MR. SMITH: There was an internal review conducted by
6 the Mine Safety Health Administration, and some time ago, it
7 released a public report regarding the performance of the Mine
8 Safety and Health Administration in inspecting the Aracoma No. 1
9 mine prior to the fire in January of '06. That's a public
10 report. It has been released and it is a public document, and
11 it makes some findings about the performance of the agency in --
12 in ensuring the safety of these mines.

13 THE COURT: Well, let me interrupt and ask. Is that
14 the report, rather than the administrative law judge's report,
15 that you are referring to, Mr. Stanley?

16 MR. STANLEY: That particular report was -- that we're
17 referring to is the one that Mr. Smith has referenced, Your
18 Honor.

19 THE COURT: Yes.

20 MR. STANLEY: It was a report that was prepared by
21 investigators. What the status or follow-up of that report with
22 regard to any criminal investigation or --

23 THE COURT: I think in this case, a civil fine.

24 MR. STANLEY: I -- I don't think that's related to the
25 ALJ matter, Your Honor. I think they are separate issues.

1 MR. LUSKIN: Your Honor, if I can clarify.

2 THE COURT: Thank you.

3 MR. LUSKIN: The report to which Mr. Smith and
4 Mr. Stanley are referring was an internal report by MSHA into
5 its own conduct, and there may be consequences that they relate
6 to the performance of MSHA. That was an investigator's report,
7 not a report or an opinion by an administrative law judge as a
8 result of any contested proceedings. The civil proceedings by
9 MSHA against Aracoma, as Your Honor knows, were concluded in a
10 parallel civil disposition that was accomplished at the same
11 time as the plea agreement resolving this case, and that matter
12 which involved the payment of a fine -- a civil fine of 1.7
13 million dollars has been concluded. If you have any more
14 questions about the status of that proceeding, Mr. Heath, who
15 represented Aracoma in that matter, is present and can answer
16 those questions.

17 THE COURT: Yes. While we're on the subject, I have
18 the general understanding that perhaps a supervisory commission
19 may have taken that under review, that is, the decision of the
20 ALJ --

21 MR. HEATH: Yes, sir, if I may --

22 THE COURT: -- which I believe perhaps is one that is
23 reviewed, as other administrative appeals often are, on a
24 substantial evidence basis.

25 MR. HEATH: Your Honor, actually it's a question of law

1 before them. The commission -- the ALJ approved the settlement,
2 including the 1.7 million dollar payment which has been made by
3 Aracoma. The next level above the administrative law judge is
4 the Federal Mine Safety Health and Review Commission. It has
5 power on its own to review decisions, if it wishes, and it
6 looked and said it wanted to review only that part of the
7 decision that related to an S&S reduction plan and how --

8 THE COURT: Related to what again?

9 MR. HEATH: I'm sorry. In the settlement agreement,
10 there was something called an S&S reduction plan. It was a plan
11 that the mine came up with to help reduce the number of
12 violations rated significant and substantial, and it ties in to
13 another part of MSHA called pattern of violations. It was
14 separate from the dollar amounts related to the penalties. We
15 have actually paid the 1.7 million dollars. That part of the
16 case is final and not subject to review. The only thing the
17 commission asked to look at was whether or not an S&S reduction
18 plan could be done outside of the pattern of violation process.
19 So it's a technical question. It has been briefed with a joint
20 brief by MSHA and Aracoma on April 3rd. It is awaiting decision
21 by the commission.

22 THE COURT: The S&S reduction plan --

23 MR. HEATH: Yes, sir.

24 THE COURT: -- is one that was generated by whom?

25 MR. HEATH: By Aracoma. It was submitted to District

1 4, the MSHA office, as a procedure to reduce the number of
2 violations rated S&S at the mine.

3 THE COURT: Was it done because Aracoma was directed to
4 produce some such plan?

5 MR. HEATH: It was Aracoma's option to do so, and they
6 chose to do it. It relates to the fact that there was a large
7 number of violations being settled at once, so they would have
8 hit the history of the mine all in one quarter which could have
9 resulted in a pattern of violation proceeding starting. So this
10 was a way to allow the mine to get its compliance history back
11 in line and also work to reduce those S&S violations.

12 THE COURT: That's the only phase of it then that is on
13 appeal.

14 MR. HEATH: Yes, sir, that's correct.

15 THE COURT: Thank you.

16 Mr. Smith, do you understand it any differently?

17 MR. SMITH: No. That's how we understand it, Your
18 Honor.

19 THE COURT: And, Mr. Stanley, do you understand it any
20 differently?

21 MR. STANLEY: Not with regard to that particular issue,
22 Your Honor. That was not the reference I was making in my
23 statement.

24 THE COURT: I understand, but now that we have
25 categorized the two, let me ask you. What is there about the

1 findings of the Mine Safety and Health Administration's internal
2 investigation that you believe would be helpful in this matter?
3 I take it, first of all, you have reviewed the report --

4 MR. STANLEY: I have, Your Honor.

5 THE COURT: -- on that matter.

6 MR. STANLEY: Yes, I have, Your Honor. Would Your
7 Honor want me to approach?

8 THE COURT: Is it the report that you are suggesting
9 that the court review?

10 MR. STANLEY: Yes, Your Honor, the publicly available
11 report, what we would suggest the court may want to focus upon.
12 Again, Your Honor, this issue I have raised is as a result of
13 our understanding that with the plea that has been entered, that
14 the United States Government will not look beyond the operating
15 subsidiary Aracoma in any further criminal investigation
16 associated with this mine fire. What we -- and that as a
17 result, that the parent corporation or other superior or senior
18 subsidiaries, such as A.T. Massey Coal Company or the parent
19 Massey Energy Company, could not be held liable in any event for
20 further criminal proceedings. What we would suggest --

21 THE COURT: Now, can I interrupt you and ask.

22 MR. STANLEY: That's okay.

23 THE COURT: The determination by whom that they could
24 not be held liable? Simply because that's the terms of the plea
25 agreement or it arises from something else?

1 MR. STANLEY: It arises from our understanding of the
2 plea agreement.

3 THE COURT: All right.

4 MR. STANLEY: And that we would suggest simply that a
5 review of this -- of this publicly available report would
6 intimate that palpable pressure was placed upon MSHA District 4
7 personnel to alter the -- the assignment of inspectors for this
8 particular mine; and that it was after such assignment, that a,
9 for want of a better term, equivalent cessation of violations
10 were found at this particular mine. When MSHA went in after the
11 fire, of course, a host, a multitude of obvious violations were
12 noted by the investigating team. And it is our concern that
13 that pressure upon MSHA may have come from Massey personnel
14 above the Aracoma chain of command.

15 THE COURT: That is something that would have taken
16 place before the events of January 19, 2006.

17 MR. STANLEY: That is correct, Your Honor. And I think
18 the publicly available report does a fairly good job of laying
19 out the chronology of the events associated with these
20 inspection assignments and the -- the change in the rate of
21 citations issued to this particular mine.

22 THE COURT: In that report, are either of the two fires
23 that took place in December of 2005 mentioned?

24 MR. STANLEY: I think there may have been passing
25 reference, Your Honor, but I would ask the court not to hold me

1 to that, only because there are multiple reports out there where
2 those fires were mentioned, and I wouldn't want to confuse the
3 court by representing one report. And, unfortunately, I did not
4 think to bring with me today a copy of the internal
5 investigation that I referenced in the statement. I should
6 have, Your Honor, and I apologize for that.

7 THE COURT: But, once again, you are referring to the
8 same thing, and that's the report that is a matter of public
9 record.

10 MR. STANLEY: It is.

11 THE COURT: Thank you.

12 MR. STANLEY: Thank you, Your Honor.

13 THE COURT: Let me ask counsel if you wish to elaborate
14 on that matter.

15 MR. SMITH: Let me just note that the report was
16 released in June of 2007, Your Honor. We had the benefit of
17 that report in our investigation and prosecution in this case.
18 And, again, I want to make sure it's properly characterized. It
19 is the review by the Department of Labor of its own agency to
20 determine its performance and effectiveness in the inspections
21 in the period leading up to the January 19, 2006, fire. It is
22 about 180 pages, plus executive summary and attachments. It's a
23 lengthy, comprehensive, and pretty, if I may say, bare-knuckled
24 look at its own agency, and my opinion probably has little
25 relevance in the criminal case right now.

1 I understand Mr. Stanley's point, but that leads into the
2 question of why we have reached the plea agreement that we have,
3 and I'm prepared to address that at the appropriate time. I
4 think the court has enough information, without reviewing the
5 report, to decide whether to accept or reject the plea
6 agreement. But we have the report. I can't recall whether we
7 gave it to Ms. Cueva or not. We may have had a digital copy
8 that we gave her, but it's an extensive report on the --
9 frankly, the, you know, the problems with inspection of this
10 mine prior to the fire in January of '06.

11 THE COURT: I gather from what has been said is that
12 the report has to do with an internal investigation of MSHA, in
13 particular, its inspectors, and it is focused on the Aracoma
14 mine and that which occurred on January 19th. Would I be
15 correct in that?

16 MR. SMITH: With what occurred on the 19th and leading
17 up to the 19th, yes, Your Honor. It reaches back I think even
18 more than one quarter. I think it reaches back for some period
19 beyond just a few quarters.

20 THE COURT: Beyond the last quarter of 2005, you are
21 saying?

22 MR. SMITH: Yes, Your Honor.

23 THE COURT: Thank you.

24 Mr. Luskin, what's your take on that?

25 MR. LUSKIN: I concur with Mr. Smith, that I don't

1 think that the report needs to become part of this sentencing
2 process; and would add, Your Honor, that while it raises
3 questions about the conduct of MSHA, it certainly does not lay
4 out any evidence whatsoever that any failures by MSHA were
5 somehow improperly caused by either individuals or entities who
6 are the beneficiaries of the nonprosecution provisions in the
7 plea agreement. That is speculation on Mr. Stanley's part.
8 There is nothing in the report that would suggest that.

9 And, of course, I am more than happy at the appropriate time
10 to talk about the nonprosecution provision because, of course,
11 Your Honor has not yet accepted the plea agreement. But I will
12 say as to this particular matter, and as to every other matter
13 related to the negotiations of the nonprosecution provisions, my
14 agreement with Mr. Smith followed the evidence, it did not
15 contradict it, and those provisions were negotiated and
16 included, only after we had gone through a very exhaustive
17 process of reviewing all of the evidence, not simply this MSHA
18 report, but obviously everything else that was produced by
19 Aracoma in the context of the grand jury investigation and the
20 civil investigation and other information that Mr. Smith had
21 acquired, and it was our view that the nonprosecution agreements
22 were appropriate precisely because there was not substantial
23 evidence that would indicate that other individuals or entities
24 outside of Aracoma should be prosecuted.

25 THE COURT: Thank you.

1 That I believe leads us to the question of the
2 nonprosecution agreement with respect to those other than
3 Aracoma and its officers and employees. Is the government
4 agreeing to nonprosecution because it can't make a case against
5 any of those individuals that it agrees not to prosecute or any
6 of those entities it agrees not to prosecute?

7 MR. SMITH: Yes, Your Honor.

8 THE COURT: And I take it that that being the case, if
9 this agreement were not accepted with that provision in it, that
10 the government would remain of the mind that there was no basis
11 for prosecuting any of these named entities and individuals,
12 other than Aracoma and its employees and officers.

13 MR. SMITH: Yes, Your Honor.

14 THE COURT: Thank you.

15 Let me ask the parties whether or not you have anything
16 further on that matter.

17 MR. SMITH: No, Your Honor. Thank you.

18 THE COURT: Let me ask whether or not, Mr. Luskin, you
19 have anything to add with respect to why this court should
20 approve this plea agreement.

21 I am going to mention a thing or two to you to begin with,
22 and it is this. First of all, the remedy by way of fine as the
23 criminal sanction in the case is the foremost weapon that one
24 would have in the hands of the court to punish the conduct. It
25 looks to me as though the fine that has been agreed upon at 2.5

1 million dollars is within 100,000 dollars of the maximum that
2 the court could in any event impose.

3 MR. LUSKIN: That is correct.

4 THE COURT: Is that a correct understanding?

5 MR. LUSKIN: Yes, sir, that is correct.

6 THE COURT: Does the government agree with that?

7 MR. SMITH: Yes, we do, Your Honor.

8 THE COURT: Other than that, the question is the extent
9 of probation and what conditions might be employed with respect
10 to probation, although probation itself is of limited value if
11 the penalty that may be imposed has already been exhausted. It
12 does seem to me that it has the refreshing prospect of
13 disclosure in the event there is a failure of compliance with
14 the court's conditions, but beyond that, it would not seem that
15 there is much for a court in the future to do if the conditions
16 of probation were violated. And I wonder whether or not counsel
17 have any different view of the matter.

18 MR. LUSKIN: No, sir, I think not. Traditionally,
19 probation serves three purposes: To ensure the payment of a
20 fine, and as Your Honor knows in this instance, the fine was
21 paid at the time that the plea was entered; to ensure
22 satisfaction of restitution obligations, and there appear to be
23 none; and, finally, to impose conditions that will deter
24 potential future violations, and as Your Honor knows from the
25 material that we provided with our sentencing memorandum and to

1 Ms. Cueva, the company is taking extraordinary steps in the wake
2 of this tragedy to ensure not only that this type of accident
3 but others, similar accidents, don't happen again. And the
4 proof of the pudding really is in the record of the mine since
5 then.

6 As Your Honor knows, in 2007, the year following the
7 accident, the mine worked almost 600,000 man-hours and produced
8 over a million tons of coal, without a single nonfatal day lost;
9 and as a general matter, since the accident, the level of
10 nonfatal days lost by this mine are about one-third the level
11 from MSHA data that are found in mines of this type. And the
12 mine has received awards both from the Massey company for its
13 safety performance, but more importantly from the Home Safety
14 Foundation which includes representatives of MSHA, and state and
15 local mine safety organizations, for its accomplishments.

16 This is not a case like the typical case where the defendant
17 stands before the court and promises to do better, where the
18 court has no assurance, based on the conduct that has taken
19 place since the offense, that those are not mere empty words.
20 In this instance, the passage of more than three years since the
21 accident gives the court an ample record to review to learn
22 whether or not those promises to do better were simply promises
23 or whether they were more than that. And we submit that the
24 efforts by the mine to turn around its operations and to deal
25 with the ugly fact that, as Mr. Stanley put it, this was an

1 avoidable accident, an avoidable tragedy, and to assure
2 themselves as much as one can in a dangerous business, that they
3 are not going to be repeated.

4 And under those circumstances, Your Honor, I don't believe
5 that a heavy hand of probation is necessary in order to assure
6 the court that this type of conduct won't be repeated.

7 THE COURT: Thank you.

8 MR. SMITH: Your Honor, in this particular case, the
9 offense conduct is fairly wide-ranging and covers a variety of
10 failures in this mine, from escapeway existence to escapeway
11 drills, to training, to the meaning of evacuation, to accurate
12 and honest records. It would be I think extremely difficult for
13 the court to try to address those failings in conditions of
14 probation. The mine has changed since the fire. Whether it's
15 as Mr. Luskin represents or not, we're not really in a position
16 to know and to say. We hope, the United States hopes, my office
17 hopes that the assurance of safety in this mine is going to come
18 from proper enforcement by the Mine Safety and Health
19 Administration, from the agency charged with that, and that is I
20 think realistically going forward the avenue to get to and to
21 ensure the safety of this mine.

22 We have very little suggestions for the court as to the
23 value of a term of probation here. You know, the court has in
24 simpler and earlier cases I think imposed a term of probation,
25 with some specific conditions directed to the harm that it saw

1 in the case. I'm not sure the court can do that here. As the
2 court knows, the main weapon we have here is the fine, and it
3 may very well be that probation, which is not mandatory in this
4 case, is not necessary. I'm not sure it would serve any of our
5 needs.

6 THE COURT: Thank you.

7 Anything further on that matter as to the court's
8 determination as to whether to accept the plea agreement?

9 MR. LUSKIN: No, sir, not on behalf of Aracoma, sir.

10 MR. SMITH: Your Honor, we do ask you to accept it.
11 It -- it is a good agreement given our investigations, and we
12 believe that it fairly represents the serious nature of the
13 conduct which is at issue here. We believe that we haven't
14 given up any single case that we could prove, and we believe
15 that we are going forward with other matters involving the fire,
16 but there is no evidence of any viable case outside the scope of
17 what this agreement allows us to pursue.

18 The reason for that, Your Honor, is, as the court knows, we
19 really have just two statutes to work with, a false statement
20 and a violation of the mandatory safety standard. Both require
21 specific knowing, intentional action, and that lets us make that
22 determination of where we have a viable case with pretty good
23 certainty. This -- this conduct was serious, but it was in the
24 opinion of the investigators and my office contained in the mine
25 and its management itself, and whether it was affected by

1 outside policy and influences can be argued, but it will never
2 rise to a criminal case of knowing and intentional action in
3 violation of one of those statutes.

4 So, we ask the court to accept the agreement.

5 THE COURT: Thank you, Mr. Smith.

6 Anything further on that matter, Mr. Luskin?

7 MR. LUSKIN: To add only this, Your Honor, to what
8 Mr. Smith said, and that is that, of course, we have cooperated
9 in the investigation since the beginning as the plea agreement
10 reflects and the presentence report reflects, and we have a
11 continuing obligation under the presentence report to cooperate
12 with the government. And so, the court can have some confidence
13 that Mr. Smith's representations about where the evidence leads
14 and the agreement which is reflected in the plea agreement is
15 the product of full cooperation on the part of Aracoma in
16 disclosing what it knows about how this tragedy occurred.

17 THE COURT: Thank you.

18 We'll be in recess for ten minutes.

19 (At 3:05 p.m. there was a recess until 3:35 p.m.)

20 THE COURT: Please be seated.

21 Let me ask with respect to the presentence report,
22 Mr. Luskin, is the presentence report in all respects factually
23 correct?

24 MR. LUSKIN: Yes, sir, it is.

25 THE COURT: And is it correct otherwise as well?

1 MR. LUSKIN: Yes, sir.

2 THE COURT: And, Mr. Smith, is this report in all
3 respects factually correct?

4 MR. SMITH: Yes, Your Honor.

5 THE COURT: And correct otherwise?

6 MR. SMITH: Yes, Your Honor.

7 THE COURT: Thank you.

8 The court finds that Aracoma has accepted responsibility for
9 its failures that have led to these convictions. As noted in
10 the presentence report, in the months and years following the
11 fatal fire at the Alma No. 1 mine in January 2006, Aracoma has
12 installed state-of-the-art fire suppression systems, has
13 developed and implemented enhanced firefighting measures and
14 technologies, has provided training and technologies for
15 emergency mine evacuation and mine rescue, and has made other
16 changes to ensure the safety of its employees.

17 Aracoma has implemented significant remedial and
18 preventative measures following the January 2006 fire, including
19 retraining of its dispatchers and EMS operators. The company
20 has installed new fire suppression systems, new fire hoses with
21 permanent water connection, and improved access. All Aracoma
22 belt examiners have been retrained, and all employees have been
23 retrained on the requirements of the mine's emergency and
24 evacuation firefighting plan, including conducting frequent and
25 compliant emergency evacuation escape drills.

1 Before and after the January 19, 2006, fire, Aracoma was
2 subject to the safety and ethics standards of Massey Energy
3 Company's, quote, Safety is Job First, unquote, program, whereby
4 employees are held to specific safety requirements that exceed
5 federal and state regulations. That program was developed to
6 prevent and detect unsafe conduct and criminal violations, as
7 well, for that matter, of federal and safety mine -- I should
8 say federal and state safety mine regulations. That program
9 includes binding employee safety commitment agreements and
10 ethics commitment agreements.

11 Aracoma, however, failed to comply with numerous mandatory
12 safety standards that are the subject of the several offenses
13 set forth in the ten counts to which Aracoma has pled guilty.
14 In particular, the court notes that the removal of the two
15 stoppings that destroyed the effect of the separation of the No.
16 2 section primary escapeway from the belt haulage entry that
17 contained the No. 9 longwall belt line went uncorrected by
18 Aracoma, even after two fires in December of 2005 should have
19 emphasized the inherent danger in the continuing failure to
20 correct that problem. One of those stoppings was removed in
21 order to accommodate a splitter box in late October 2005 and in
22 late November 2005. Another one was removed in order to
23 accommodate an overheating problem with respect to electrical
24 equipment due to an installation then taking place.

25 It is simply inexcusable that those two stoppings would have

1 been removed and not quickly replaced, and particularly to have
2 allowed the condition to continue for such a lengthy period of
3 time until the fire on January 19, 2006. In that respect, the
4 court notes that Aracoma has recognized that it recklessly
5 failed to replace those stoppings, or, in the alternative, to
6 provide additional ventilation controls to restore the
7 separation of the No. 2 section primary escapeway from the No. 9
8 longwall belt haulage.

9 When the fire broke out on January 19, 2006, because of the
10 removal of the two stoppings, heavy smoke from the fire in the
11 No. 9 longwall belt line unit poured into the No. 2 working
12 section's primary escapeway. That would in due course doom two
13 of the workers in that No. 2 section to a tragic death.
14 Fortunately, the other ten members of the No. 2 section were
15 able to escape. Compounding the problem was the lack of water
16 to put out the fire.

17 The men on the scene in the No. 9 longwall belt line area
18 exhausted the fire extinguishers that were available, but when
19 they went to connect the fire hose, they find that the coupling
20 would not fit the valve; and then when they attempted to use the
21 water valve as a means of directing water onto the fire, they
22 found that there was no flow of water. That was because the
23 shut-off valves someplace earlier in the water line system had
24 precluded the availability of water for that or any other
25 purpose.

1 At the same time, further complicating the circumstance was
2 the lack of training of a new dispatcher, who, upon first
3 learning of the fire, ought to have directed the men to
4 evacuate, that is, those at the No. 2 working section would not
5 immediately be aware of the fire that was taking place in the
6 No. 9 longwall belt line. That was not done when communication
7 was had from the scene to the dispatcher of burning embers, and
8 it was not done soon after that when the carbon monoxide alarm
9 sounded, not once, but twice, so that the men in the No. 2
10 section were not contacted soon enough to get out unscathed.

11 The combination of those failures are simply inexcusable and
12 shows a lack of concern at the time with the safety and welfare
13 of the miners.

14 The court notes nevertheless that the plea agreement has
15 called Aracoma to account. Each of those matters to which I've
16 referred, and several others as well, are the subject of the
17 guilty plea in this case. The government, in the course of
18 reaching agreement with Aracoma, has agreed as well to another
19 condition that is an unusual one, and that is, the government
20 has agreed to nonprosecution of other entities named in the plea
21 agreement other than Aracoma and its employees and officers.

22 The court has learned first from Mr. Stanley today of the
23 existence of the MSHA report and what value and impact it may
24 have. The court has also heard from the government, which has
25 considered that report, and has informed the court that after

1 taking into account that which is in the report itself, the
2 government does not have a case to make against those
3 individuals who are the subject of the nonprosecution agreement,
4 as well as those entities that are the subject of that agreement
5 as well. It is, of course, for the executive to institute
6 investigations and prosecutions. The government informs the
7 court that it lacks a case in that respect, and the court
8 accepts the government at its word. It is again the entity that
9 is charged with that responsibility.

10 Because the government has in effect informed the court that
11 it is giving up nothing by agreeing to the nonprosecution
12 provision, the court has concluded that, in as much further as
13 the agreement calls for a near maximum penalty of a fine of 2
14 1/2 million dollars, which is in addition to the civil penalty
15 of 1.7 million dollars, that the agreement is fair and in the
16 interests of the defendant and the public. And, accordingly,
17 the court has concluded to accept the plea agreement, and to
18 proceed to the sentencing of the defendant under its terms which
19 are binding on the court as has earlier been noted; that is,
20 once accepted.

21 Let me ask the parties whether or not you have anything
22 further at this time.

23 MR. SMITH: No, Your Honor. Thank you.

24 MR. LUSKIN: No, Your Honor.

25 THE COURT: Let me ask whether, Mr. Luskin, you have

1 anything you'd wish to say in behalf of the defendant before the
2 court imposes sentence.

3 MR. LUSKIN: No, Your Honor. I think you've given us
4 the opportunity to say everything that is relevant.

5 THE COURT: And let me ask, Mr. Smith, whether or not
6 the government has any comment.

7 MR. SMITH: Nothing further, Your Honor. Thank you.

8 THE COURT: And with that, do you see any reason why
9 sentence should not now be imposed in this matter, Mr. Luskin?

10 MR. LUSKIN: No, sir.

11 THE COURT: And do you see any reason why sentence
12 should not now be imposed, Mr. Smith?

13 MR. SMITH: No, Your Honor.

14 THE COURT: The court imposes a sentence in accordance
15 with the plea agreement, and directs the payment of the 2 1/2
16 million dollar fine that is applied to the various counts as set
17 forth in the plea agreement, which sum has already been paid.
18 The court similarly imposes a -- or, rather, an assessment of
19 1525 dollars under paragraph 4 of the plea agreement, which has
20 also been paid; both those sums being in the custody of the
21 clerk who has deposited them in the Treasury.

22 The court imposes as well a sentence of probation on each of
23 the counts. The court directs that the probationary period run
24 for a time of three years concurrently on each count. The court
25 directs as a special condition of probation that the defendant

1 continue to comply with each of the reforms implemented as
2 described in the presentence report and the sentencing
3 memorandum that the defendant has filed at the Aracoma mine, and
4 the court further directs that if there is any failure to
5 continue compliance with those procedures, that not only is the
6 probation officer handling this matter to be so informed within
7 thirty days, but so, too, is the president and CEO of Massey
8 Energy Company, and the defendant is to notify the probation
9 officer as well in connection with reporting those failures, if
10 any there be, that such notice has, in fact, been transmitted.

11 Let me ask the parties whether or not you have anything
12 further at this time.

13 MR. SMITH: Your Honor, does the court need to make a
14 further order to direct the payment of the money from the
15 court's registry into the United States Treasury?

16 THE COURT: The court will so direct.

17 MR. SMITH: Thank you, Your Honor. That's all the
18 United States has further.

19 THE COURT: Very good.

20 MR. LUSKIN: Nothing further, Your Honor.

21 MR. SMITH: And the special assessment as well, I
22 believe.

23 THE COURT: I understand.

24 MR. SMITH: Thank you, Your Honor.

25 THE COURT: Thank you.

1 Let me ask again, anything further?

2 MR. SMITH: No, Your Honor.

3 MR. LUSKIN: No, sir.

4 THE COURT: The defendant has, Mr. Luskin, as you well
5 know, ten days from this date within which to appeal its
6 conviction and sentence in this case.

7 MR. LUSKIN: Yes, sir.

8 THE COURT: And the court would ask again if there is
9 anything further.

10 MR. SMITH: Your Honor, if I might raise one question.

11 THE COURT: Go ahead.

12 MR. SMITH: Does the court need to make a particular
13 finding regarding the absence of any need for restitution in
14 this particular criminal matter?

15 THE COURT: I thought maybe I'd already done it, but if
16 I haven't, I do so now.

17 MR. SMITH: Thank you.

18 THE COURT: And that will be incorporated into the
19 order.

20 MR. SMITH: That's all I have.

21 THE COURT: Thank you.

22 MR. LUSKIN: Nothing further, Your Honor.

23 THE COURT: Again, anything further?

24 MR. LUSKIN: No, sir.

25 MR. SMITH: No, Your Honor.

1 THE COURT: I thank you for being present.
2 Mr. Stanley, I thank you for being present as well, along with
3 Mr. Hrko who has also informed us of the position of his
4 clients, but in particular to Tonya Hatfield, I appreciate your
5 being here as well, and I especially appreciate Ms. Bragg being
6 present as well. Thank you.

7 (At 3:57 p.m. the hearing was concluded.)

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9 REPORTER'S CERTIFICATE

10 I, Barbara Steinke, Registered Merit Reporter, do hereby
11 certify that the foregoing proceedings were reduced to writing
12 by me at the time and place therein mentioned, and said
13 proceedings are a true and accurate transcript from my notes. I
14 further certify that I am neither related to any of the parties
15 by blood or marriage, nor do I have any interest in the outcome
16 of the above matter.

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December 3, 2009

s/Barbara Steinke